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OFFICE OF PETITIONS

In re Application of
Qian Zhang et al.
Application No. 09/848,706
Filed: May 2, 2001
Attorney Docket No. MS1-716US

ON PETITION

This is a decision on the petition filed August 25, 2006, under 37 CFR 1.137(a)¹, to revive the above-identified application.

The petition under 37 CFR 1.137(a) is **GRANTED**.

The above-identified application became abandoned as a result of petitioner's failure to file a proper appeal brief within the time period provided in 37 CFR 1.192(a). A Notice of Appeal was filed July 18, 2005. On July 1, 2005, an appeal brief was filed. On August 25, 2005, a Notification of Non-Compliant Appeal Brief (37 CFR 41.37) was mailed. Accordingly, a Notice of Abandonment was mailed July 5, 2006.

Petitioner argues that a response was in fact timely filed. In support of petitioner's claim is a copy of the response with a certificate of facsimile transmission dated November 10, 2005 and an auto-reply acknowledgment.

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used

¹A grantable petition under 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed; In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(l);

(3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

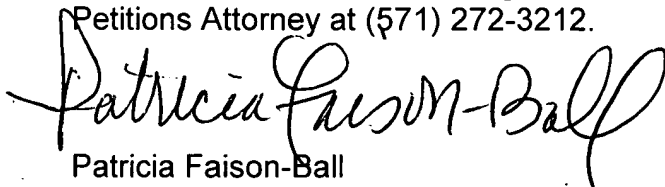
and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.²

Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.³

In view of the certificate of facsimile transmission, pursuant to 37 CFR 1.8, it is concluded that the response to the Notification of Non-Compliant Appeal Brief (37 CFR 41.37) was in fact timely filed on November 10, 2005.

The matter is being referred to Technology Center 2142 for further examination in due course.

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.



Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions

²In *re Mattullath*, 38 App. D.C. 497, 514-15 (1912)(quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also *Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), *aff'd*, 143 USPQ 172 (D.C. Cir. 1963); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." *Haines v. Quigg*, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

³*Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).